U.S. Department of Labor

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Issue Date: 02 August 2007

Case No.: 2006-BLA-05695

In the Matter of

H. G.
Claimant

v.

RIVER BASIN COAL CO.
Employer

and

THE FIRE & CASUALTY CO. OF CT
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances: RON CARSON
For the Claimant

DENISE KIRK ASHE, Esq.
For the Employer

Before: ADELE HIGGINS ODEGARD
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 ("the Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a disease of the lungs resulting from coal dust inhalation.

On May 12, 2006, this case was referred to the Office of Administrative Law Judges for a formal hearing (DX 27).[1] A hearing was held before Administrative Law Judge (ALJ) Paul H. Teitler on November 28, 2006, at which time the parties had full opportunity to present evidence and argument. ALJ Teitler allowed the record to remain open to permit the parties to submit additional matters by January 15, 2007 (T. at 18-20); the parties submitted evidence and revised pre-hearing statements. They also submitted briefs containing their closing arguments.

Subsequently, on May 10, 2007, ALJ Teitler died, and this matter was assigned to me. On May 30, 2007, the parties were informed of ALJ Teitler's death by District Chief Judge Robert D. Kaplan, and given the opportunity to object to a decision made on the existing record. See Strantz v. Director, OWCP, 3 B.L.R. 1-431 (1981). No party objected.

The decision that follows is based upon my analysis of the record, the arguments of the parties, and the applicable law.

I. ISSUES

The following issues are presented for adjudication:[2]

(1) whether the Employer was properly designated as the responsible operator;
(2) whether the Claimant suffers from pneumoconiosis;
(3) whether his pneumoconiosis, if any, arose from coal mine employment;
(4) whether the Claimant is totally disabled;
(5) whether the Claimant's total disability, if any, is due to pneumoconiosis; and
(6) whether the Claimant has established a change in a condition of entitlement pursuant to 20 C.F.R. § 725.309(d).

II. PROCEDURAL BACKGROUND

The Claimant filed this claim for benefits on June 17, 2005 (DX 3). On February 16, 2006, the District Director issued a proposed Decision and Order awarding benefits to the Claimant, upon a determination that the Claimant had established all the elements of entitlement (DX 23). The Employer timely appealed and requested a formal hearing (DX 24). Pending resolution of the appeal, payments to the Claimant have been made from the Black Lung Disability Trust Fund. These payments are subject to reimbursement from the Employer if the Claimant's entitlement to benefits is upheld (DX 44). See § 725.602.

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[1] The following abbreviations are used in this Opinion: "DX" refers to Director's Exhibits; "CX" refers to Claimant's Exhibits; "EX" refers to Employer's Exhibits; "T." refers to the transcript of the November 28, 2006 hearing.

[2] These issues are the issues listed in the Employer's post-hearing brief. Additionally, the Employer preserved objections to the amended regulations (DX 22). At the hearing, the Employer withdrew its controversion of several issues, and also stipulated that the length of the Claimant's coal mine employment was 18 years and four months (T. at 5). The Claimant did not object to the stipulation. I find that the evidence of record supports this stipulation.

This is a subsequent claim for benefits. § 725.309. The Claimant submitted his initial claim for benefits in September 1987. After his claim was denied, the Claimant submitted several successive requests for modification. That claim was finally denied in June 1996. In his prior claim, the Claimant established none of the elements of entitlement (DX 1).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Factual Background

The Claimant was born in January of 1937. He is married and has no minor children (DX 3). As stipulated, the Claimant worked in coal production for more than 18 years. According to the Claimant's claim, he left the mines in 1986, when the mine at which he was employed shut down, and his most recent position in the mines was as a shuttle car operator (DX 3, 5). The Claimant's Social Security Administration records reflect that the Claimant began working for coal mine operators in 1965 or 1966, and that he worked steadily for such employers through 1986 (DX 7).[3]

According to the Claimant's Social Security Administration records, the Claimant worked for the Employer, River Basin Coal Company, from 1980 through 1983. In 1983, he earned $17,389.64 working for the Employer. The Claimant's earnings from 1984 through 1986 are recorded as follows:

1984:[4]	P.V. Mining Co., Louisville KY	$1,190.25
	Double C Coal Co., Inc., Caryville TN	$1,136.35
	R & J Coal Corp., Briceville TN	$2,054.00
1985:	A & L Coal Co., Inc., Wartburg TN	$13,546.82
1986:	A & L Coal Co., Inc., Wartburg TN	$1,629.00
	Allied Coal Corp., Oneida TN	$7,576.03

B. Claimant's Testimony

The Claimant testified under oath at the hearing. He stated that his last employer was Allied Coal, and that he worked for that company for only about a month before the mine shut down. Prior to that, the Claimant stated, he worked for A & L Coal Company, and then River Basin Coal Company. He stated that he worked for River Basin for about three years, and then they shut the mine down. He was a shuttle car driver, and also worked a cutting machine. The Claimant testified that all of his coal mine work was underground. As a shuttle car operator, he

[3] It is not clear whether the Claimant's employer in 1965 was a coal mine operator; also, the Social Security records record no earnings for 1976.

[4] The record also includes a W-2 form from this year made out to a person with the same last name as the Claimant. However, the first name is different. There is no Social Security number on this form. As it does not appear that the pay information on this document relates to the Claimant, I disregarded it.

worked at the face of the mine, hauling coal to the beltline. It was a dusty job, and he did not wear a respirator. The Claimant stated that he worked six days per week, about seven and a half hours per day (plus a break for lunch). The job required him to lift timbers, weighing 25 to 50 pounds, 30 to 50 times per shift, when the timbers were being set. The timbers were normally set on Saturdays. On the weekends, the beltline was also shoveled. Most of the time, the coal was 30 to 40 inches high, so he could not stand and had to crawl.

The Claimant testified that the dustiest job he had was running a cutting machine, and he did that job off and on for about six years. He stated that he never required time off from work due to an injury, and he stopped working in 1986, when Dr. McNeeley stopped him from working. According to the Claimant, he went to Dr. McNeeley because he was short of breath and the doctor took an X-ray and a breathing test and told him he couldn't work anymore, and sent the Claimant to a lung specialist.

The Claimant stated that his breathing started bothering him in 1984, but the first time he sought medical care was in 1986, which was when he saw Dr. McNeeley. The Claimant testified that his current treating physician is Dr. Thakur, whom he has been seeing for four or five years, and that Dr. Thakur has prescribed oxygen, which he uses 24 hours a day. The Claimant stated that he also uses a nebulizer four times a day and an inhaler twice a day. The Claimant testified that he is not being treated for any illnesses other than his breathing. The Claimant stated that he is unable to do anything much, because of his breathing difficulties.

On cross examination, the Claimant testified that he could not recall precisely how long he worked for A & L Coal Company. He recalled that he testified at a prior hearing, in 1989, and agreed that his recollection would probably be better then than at the present time. The Claimant agreed that his prior testimony, that he worked for A & L for about a year, perhaps a few days longer, was correct. The Claimant affirmed that Allied Coal and River Basin were owned by the same people, but that A & L Coal was owned by someone else entirely, and that the people he worked with when he was at A & L were not the same people he worked with at River Basin.

The Claimant testified that at Allied he was paid $10.80 an hour, but was then cut back to $10.00, and then his whole shift was laid off. He stated that he believes he was paid $9.00 per hour for 40 hours of work at A & L, and that he could have been paid $10.00 per hour at River Basin, but is not sure. The Claimant indicated that he saw Dr. McNeeley a few months after he was laid off. The Claimant testified that he is currently receiving Social Security disability payments, and that he filed a Black Lung claim at the same time he filed for his Social Security disability.

The Claimant stated that has not worked since 1986 and that he did not look for a job after he stopped working at Allied Coal. He testified that he had been a smoker in the past, beginning as a teenager and stopping about 1984. The Claimant stated that he stopped smoking because his breathing was getting bad, and has not smoked since, and that his wife continues to smoke. Regarding his medications, the Claimant stated in addition to the breathing medications he mentioned earlier, he also takes a pill for his breathing, and has been taking a pill for his high blood pressure since 1986. He stated that his wife is still his dependent.

C. Relevant Medical Evidence

In his affirmative case, the Claimant presented interpretations of his X-ray of June 13, 2005 by Dr. Alexander and Dr. Miller (DX 13), as well as pulmonary function studies administered by Dr. Narayanan (DX 13) and Dr. Roaster (CX 2). The Claimant also submitted a medical report from Dr. Thakur (CX 3). In rebuttal, the Claimant submitted X-ray interpretations from Dr. Alexander of the Claimant's X-rays of November 10, 2005 and September 6, 2005 (CX 1, 5).

In its affirmative case, the Employer presented a medical report, dated November 2005, from Dr. Abdul Dahhan. This report included an X-ray interpretation, arterial blood gas test, and pulmonary function test administered under Dr. Dahhan's supervision (EX 1). After the hearing, as authorized by ALJ Teitler, the Employer submitted a rehabilitative report from Dr. Dahhan pertaining to the interpretation of the November 10, 2005 X-ray. In rebuttal, the Employer submitted an interpretation from Dr. Larry West of the Claimant's September 6, 2005 X-ray (EX 3), and an assessment of the Claimant's June 11, 2005, pulmonary function study by Dr. Bruce Broudy (EX 5).

Dr. Glen Baker conducted the Claimant's pulmonary evaluation, required under § 725.406, in September 2005 (DX 12).

These items will be discussed in greater detail below.

D. Subsequent Claim

Because this claim is a subsequent claim, it must be denied unless the Claimant can demonstrate that one or more applicable conditions of entitlement have changed since the denial of the prior claim. § 725.309(d). See Grundy Mining Co. v. Flynn, 353 F.3d 467 (6th Cir. 2004). Previously, the Claimant did not establish any of the elements of entitlement (DX 1).

As § 725.309(d) states, the following rules pertain to the adjudication of subsequent claims:

> (1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim;
>
> (2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. . . .[I]f the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously;
>
> (3) If the applicable conditions of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement . . . .
>
> (4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based upon a party's failure to contest an issue . . . shall be binding on any party in the adjudication in the

subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

E. Designation of Responsible Operator

In this case, the Employer has controverted its designation as the Responsible Operator for the Claimant's claim. The term "operator" is defined in § 725.491(a) as "(1) Any owner, lessee, or other person who operates, controls, or supervises a coal mine, or any independent contractor performing services or construction at such mine; or (2) Any other person who: … (iii) paid wages or a salary, or provided other benefits, to an individual in exchange for work as a miner….".

The operator responsible for the payment of benefits shall be the potentially liable operator that most recently employed the miner. § 725.495. Section 725.494 states that a "potentially liable operator" must have been an operator for any period after June 1973 (§ 725.494(b)); must have employed the miner for a cumulative period of not less than one year (§ 725.494(c)); must have employed the miner for at least one day after December 1969 (§ 725.494(d)); and must be capable of assuming financial liability for the payment of benefits (§ 725.494(e)). The latter condition is established if the operator had insurance for the time period covering the miner's employment; if the operator qualified as a self-insurer and still has sufficient assets to self-insure or secure the payment of benefits; or if the operator possesses sufficient assets to secure the payment of benefits. Id. Under the regulation, a "year" is defined as "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which a miner worked in or around a coal mine for at least 125 'working days.'" § 725.101(a)(32). If evidence is insufficient to establish the beginning and ending dates of employment, then the adjudication officer may use ratio of the miner's yearly wage to the average miner's wage, as established by the Bureau of Labor statistics, to establish the length of a miner's work history. § 725.101(a)(32)(iii).

Under § 725.495(c), the designated responsible operator shall bear the burden of proving either: (1) that it does not possess sufficient asserts to secure the payment of benefits; or (2) that it was not the potentially liable operator that most recently employed the Claimant. Such proof must include evidence that the Claimant was employed as a miner after he stopped working for the responsible operator, and that the more recent employer was a potentially liable operator as defined in § 725.494. This includes a requirement that the designated responsible operator demonstrate that the more recent employer possesses sufficient assets to secure the payment of benefits.

Here, the Employer states that it is not the most recent potentially liable operator that employed the Claimant and asserts that A & L Coal Company, which employed the Claimant in 1985 and 1986, should be designated as the responsible operator. In support of its argument, the Employer cites the Claimant's testimony from his prior claim, in which he stated that he worked for A & L for about a year, perhaps a little more. Additionally, the Claimant testified at the hearing on his current claim that he earned $9.00 per hour at A & L. At that rate, the Employer asserted, the Claimant's earnings for A & L constituted about 210 days of employment, which is far more than the 125 days of employment necessary to constitute a "year" of employment under

the governing regulation.[5] The Employer also stated that A & L was identified as a potentially liable operator and is financially able to secure the payment of benefits. Employer's brief at 11-13. The Claimant did not address the issue of responsible operator in his closing brief.

In his testimony on his prior claim, the Claimant stated the following in response to the question: "How long did you work for A & L?" "It was right at a year, it might have been a few days longer. It's close to a year, or a little longer, I'm not for sure" (sic) (DX 1 [Hearing Transcript at 27]). In response to the question whether he recalled what month he began working for A & L, the Claimant replied: "I'm not for sure, but I believe it's March." Id. Earlier in that hearing, the Claimant stated that he quit working for A & L and then worked for Allied, because Allied paid better and had better benefits, and that he worked for Allied for about three months before he was laid off on June 2, 1986. Id., at 20-21.[6]

In the administrative processing of the current claim, the District Director identified both the Employer and A & L and potentially liable operators, as required under § 725.407(b) (DX 16, 17). In response to the notification that it had been named as a potentially responsible operator, A & L submitted a statement from the Claimant, dated August 4, 2005, in which the Claimant responded to specific inquiries. One of the questions was whether the Claimant had been employed by A & L for a year or more. The Claimant circled "No." The Claimant also indicated that he worked continuously for A & L, that he earned $9.00 per hour, and that he typically worked 5 days per week, 8 hours per day (DX 16).

An operator may be designated as the responsible operator only if that operator has employed the Claimant as a miner for one year or more. §§ 725.494, 725.495. As the regulation makes clear, an individual must be employed by the operator for one full year and also must be employed as a miner for 125 work days, in order for the operator to be designated as the responsible operator. The method the regulation prescribes using the ratio of a claimant's wages to the Bureau of Labor Statistics averages is used to determine the "length of employment" but is not used to determine whether an operator has employed a claimant for the requisite year, in order to be named as a responsible operator. See Daniels Co., Inc. v. Mitchell, 479 F.3d 323 (4th Cir. 2007).

Contrary to the Employer's assertions, the evidence of record does not establish that A & L employed the Claimant for a year. In fact, the evidence tends to establish that the A & L employed the Claimant for less than a year. The Claimant's testimony at the two hearings was uncertain and contradictory. On the one hand, he stated that he worked for A & L for a year, perhaps a little more, and began working for them in the month of March; on the other hand, he testified that he left A & L for Allied, worked for Allied for about three months, and then was

[5] The Employer did not point out that the Claimant's total earnings with A & L for 1985 and 1986 did not meet the "average" wage set forth by the Bureau of Labor statistics for either year.

[6] After the prior hearing, ALJ Thomas dismissed A & L, upon a finding that "[t]he evidence does not persuasively establish that Claimant was employed by A & L for a full calendar year, as required by the regulations" (DX 1[ALJ Thomas Decision and Order, June 11, 1990, at 5](emphasis in original)).

laid off by Allied on June 2. In the most recent hearing, the Claimant testified that he worked for Allied for about a month before being laid off, but he also testified he stopped working because of his breathing problem. The record reflects that the Claimant earned more than $7,500 working for Allied in 1986; this amount suggests that the Claimant worked for Allied for much longer than one month.

Based on these facts, it is highly unlikely that the Claimant worked for A & L for a full year. Additionally, based on the Claimant's testimony, as well as his written statement in which he stated that he earned $9.00 per hour for a 40 hour week, it appears that the Claimant worked approximately 210 days, which equates to about 42 weeks, to attain his reported earnings for A & L of $15,175.82.

Because there is insufficient evidence to establish that the Claimant worked for A & L for one year, as the regulation defines a "year" in § 725.101(a)(32), A & L cannot be designated the responsible operator under § 725.495. Consequently, I find that the Employer, who employed the Claimant from 1980 through 1983, has been properly designated as the Responsible Operator.[7]

F. Entitlement

Because this claim was filed after January 19, 2001, the Claimant's entitlement to benefits is evaluated under the revised regulations set forth at 20 C.F.R. Part 718. The Act provides for benefits for miners who are totally disabled due to pneumoconiosis. § 718.204(a). In order to establish an entitlement to benefits under Part 718, the Claimant bears the burden to establish the following elements by a preponderance of the evidence: (1) the miner suffers from pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) the miner is totally disabled; and (4) the miner's total disability is caused by pneumoconiosis. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994).

1. Elements of Entitlement:

Pneumoconiosis Defined:

Section 718.201(a) defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." This definition includes both medical or "clinical" pneumoconiosis, and statutory, or "legal" pneumoconiosis, which themselves are defined in that subparagraph at (1) and (2). "Clinical" pneumoconiosis consists of diseases recognized by the medical community as pneumoconioses, characterized by permanent deposition of substantial amounts of particulates in the lungs, and the fibrotic reaction of the lung tissue, caused by dust exposure in coal mine employment. "Legal" pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. Further, § 718.201(b) states: "a disease 'arising

[7] Even if A & L is determined to have employed the Claimant for one year, there is insufficient evidence to establish that the Employer has demonstrated that A & L has sufficient financial assets to secure the payment of benefits, as § 725.495(b)(2) also requires.

out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."

a. Whether the Claimant has Pneumoconiosis

There are four means of establishing the existence of pneumoconiosis, set forth at §§ 718.202(a)(1) through (a)(4):

(1) X-ray evidence: § 718.202(a)(1).
(2) Biopsy or autopsy evidence: § 718.202(a)(2).
(3) Regulatory presumptions: § 718.202(a)(3).[8]
(4) Physician opinion based upon objective medical evidence: § 718.202(a)(4).

As this claim is governed by the law of the Sixth Circuit, the Claimant may establish the existence of pneumoconiosis under any one of the alternate methods set forth at § 725.202(a). See Cornett v. Benham Coal Co., 227 F.3d 569, 575 (6th Cir. 2000); Furgerson v. Jericho Mining, Inc., 22 B.L.R. 1-216 (2002)(en banc).

1) X-ray Evidence

Section 718.202(a)(1) states that a chest X-ray conducted and classified in accordance with § 718.102 may form the basis for a finding of the existence of pneumoconiosis. ILO Classifications 1, 2, 3, A, B, or C shall establish the existence of pneumoconiosis; Category 0, including subcategories 0/0 and 0/1, do not establish pneumoconiosis. Category 1/0 is ILO Classification 1.

[8] These are as follows: (a) an irrebutable presumption of total disability due to pneumoconiosis if there is evidence of complicated pneumoconiosis (§ 718.304); (b) where the claim was filed before January 1, 1982, there is a rebuttable presumption of total disability due to pneumoconiosis if the miner has proven fifteen (15) years of coal mine employment and there is other evidence demonstrating the existence of totally disabling respiratory or pulmonary impairment (§ 718.305); or (c) a rebuttable presumption of entitlement applicable to cases where the miner died on or before March 1, 1978 and was employed in one or more coal mines prior to June 30, 1971 (§ 718.306).

The current record contains the following chest X-ray evidence:

Date of X-Ray	Date Read	Ex. No.	Physician	Radiological Credentials[9]	Interpretation
06/13/2005	06/25/2005	DX 13	Alexander	BCR, B reader	ILO: 1/2, p/q, 4 lung zones. Additional boxes checked: (me)[emphysema]; (kl)[sepal (kersey) lines]. Narrative comment: "Some 's' opacities are also present. Left shoulder prosthesis."
06/13/2005	12/14/2005	DX 13	Miller	BCR, B reader	ILO; 1/2, t/q, 6 lung zones. Additional boxes checked: (ax)[coalescence of small opacities];(me); (fr)[fractured rib(s)]; pl [pleural thickening]. Narrative report comments: "There are multiple bilateral small and round opacities ranging in size up to approximately 3 mm. There are no large opacities. There are changes of chronic obstructive pulmonary disease. There is coalescence of small pneumoconiosis opacities….Impression: Findings consistent with simple pneumoconiosis, category t/q, profusion 1/2. Coalescence of small pneumoconiosis opacities (ax). Thickening of minor fissure (pl). Chronic obstructive pulmonary disease (em). Old left eighth rib fracture (fr)."
09/06/2005	09/06/2005	DX 12	Baker	B reader	ILO: 1/0, p/q, 4 lung zones. Additional box checked: (em).
09/06/2005	10/24/2006	EX 3	West	BCR, B reader	ILO: 0/1, q/q, 2 lung zones. Additional box checked:

[9] A physician who is a Board-certified radiologist ("BCR") has received certification in radiology of diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Board of Radiology. See generally: http://www.answers.com/topic/radiology#after_ad1. A B reader is a physician who has demonstrated proficiency in assessing and classifying X-ray evidence of pneumoconiosis by successful completion of an examination conducted by the National Institute for Occupational Safety and Health (NIOSH). NIOSH is a part of the Centers for Disease Control and Prevention, in the U.S. Department of Health and Human Services. See 42 C.F.R. § 37.51 for a general description of the B reader program.

					(fr). Narrative report comments: "There are some scattered small rounded parenchymal opacities in the upper lungs. Some are obscured by underexposure in the periphery. There are also a few reticular small interstitial opacities primarily in the upper right lung. The lower lungs are largely clear, occasional small opacities are scattered in the mid lung zones….This film is borderline for evidence of coal workers' pneumoconiosis with small opacities graded as q/q, 0/1. The profusion may be underestimated due to the underexposed upper zone periphery. Impression: A few small rounded opacities graded as q/q, 0/1, possibly underestimated from upper zone underexposure. Borderline for evidence of COPD."
09/06/2005	11/30/2006	CX 5	Alexander	BCR, B reader	ILO: 1/2, q/t, 4 lung zones. Additional boxes checked: (ax)(em)(fr). Narrative comments: "ax in right upper zone. Emphysematous changes in lower zones…."
11/10/2005	11/10/2005	EX 1	Dahhan	B reader	ILO: Negative for pneumoconiosis. Additional box checked: (em).[10]
11/10/2005	12/19/2005	CX 1	Alexander	BCR, B reader	ILO: 1/2, p/q, 4 lung zones. Additional boxes checked: (ax)(em). Narrative comments: "Highest profusion of small opacities is in right upper zone; area of coalescence (ax) in right upper zone. Emphysematous changes in lower zones…."

[10] The Employer submitted a supplemental report from Dr. Dahhan, in rebuttal of the Claimant's interpretation of this X-ray, as permitted under § 725.414(a)(3)(ii) (EX 8). In his supplemental report, Dr. Dahhan stated that he reviewed the X-ray, again found no radiological evidence of coal workers' pneumoconiosis, and that Dr. Alexander's interpretation of the X-ray does not change his earlier conclusion that the Claimant has no evidence of pneumoconiosis secondary to inhalation of coal dust. Dr. Dahhan also noted that Dr. Alexander rated the film quality as "2," lower than the quality "1" to which he had classified it.

Where two or more X-ray reports conflict, consideration shall be given to the radiological credentials of the physicians interpreting the X-rays. § 718.202(a)(1). It is well established that the interpretation of an X-ray by a B reader may be given additional weight by the fact-finder. Aimone v. Morrison Knudson Co., 8 B.L.R. 1-32, 34 (1985); Martin v. Director, OWCP, 6 B.L.R. 1-535, 537 (1983). The Benefits Review Board has also held that the interpretation of an X-ray by a physician who is a Board-certified radiologist as well as a B reader may be given more weight than that of a physician who is only a B reader. Scheckler v. Clinchfield Coal Co., 7 B.L.R. 1-128, 131 (1984). Additionally, a finder of fact is not required to accord greater weight to the most recent X-ray evidence of record. Rather, the length of time between the X-ray studies and the qualifications of the interpreting physicians are factors to consider. McMath v. Director, OWCP, 12 B.L.R. 1-6 (1988); Pruitt v. Director, OWCP, 7 B.L.R. 1-544 (1984); Gleza v. Ohio Mining Co., 2 B.L.R. 1-436 (1979).

For the purpose of determining the X-ray evidence, I give more weight to the opinions of physicians who are Board-certified radiologists and B readers than I do to the opinions of physicians who are not Board-certified radiologists but are B readers. I give more weight to the opinions of the former because they have wide professional training in all aspects of X-ray interpretation. I give equal weight to all physicians who possess the same professional credentials (for example, all Board-certified radiologists).

Discussion

As listed above, the record contains three X-rays, all taken within a period of five months in 2005. There are two interpretations of the first X-ray, taken on June 13, 2005 (06/13/2005); both interpretations are from dually-qualified physicians, and both are positive for pneumoconiosis. There are three interpretations of the second X-ray, taken on September 6, 2005 (09/06/2005); Dr. Baker, a B reader, interpreted the film as positive for pneumoconiosis; Dr. West, who is dually qualified, interpreted the film as negative for pneumoconiosis but his narrative comments indicated that the film was "borderline" and stated that the profusion he observed "may be underestimated" based on the quality of the film; Dr. Alexander, who is dually qualified, interpreted the film as positive for pneumoconiosis. There are two interpretations of the most recent film, taken on November 10, 2005 (11/10/2005); Dr. Dahhan, a B reader, interpreted the film as negative for pneumoconiosis, while Dr. Alexander interpreted the same film as positive. After reviewing Dr. Alexander's interpretation, Dr. Dahhan stated that his interpretation of the film did not change.

All interpretations of the 06/13/2005 X-ray are positive for the disease. Regarding the 09/06/2005 film, I weigh Dr. West's interpretation more heavily than Dr. Baker's, because Dr. West is dually qualified and Dr. Baker is not a radiologist. Dr. West's conclusion was that the film was "borderline" for pneumoconiosis. I weigh Dr. West's conclusion equally with Dr. Alexander's, because both physicians are dually qualified. Consequently, weighing both opinions, I find that the weight of the film of 09/06/2005 is neither positive nor negative for pneumoconiosis. Regarding the film of 11/10/2005, I find that the weight of that film is positive for the disease, because I give more weight to the opinion of Dr. Alexander, who is dually qualified and who interpreted the film as positive, than I do to Dr. Dahhan, who is a B reader and who interpreted the film as negative.

Based on the foregoing, where the weight of the evidence of two films is positive and the weight of the evidence regarding the third film is neither positive nor negative, I find that the Claimant has established that he has pneumoconiosis, based on the X-ray evidence. In making this finding I note specifically that, regarding each film, there is at least one interpretation by a dually qualified physician that is positive for pneumoconiosis, and there are no interpretations from dually qualified physicians that are unequivocally negative.

2) Biopsy or Autopsy Evidence

A determination that pneumoconiosis is present may be based on a biopsy or autopsy. § 718.202(a)(2). That method is not available here, as the current record contains no such evidence.

3) Regulatory Presumptions

A determination of the existence of pneumoconiosis may also be made using the presumptions described in §§ 718.304, 718.305, and 718.306. Section 718.304 requires X-ray, biopsy, or equivalent evidence of complicated pneumoconiosis, which is not present in this case. Section 718.305 is not applicable because this claim was filed after January 1, 1982. §718.305(e). Section 718.306 applies only in cases of deceased miners who died before March 1, 1978. Since none of these presumptions applies in this case, the existence of pneumoconiosis has not been established under § 718.202(a)(3).

4) Physician Opinion

The fourth way to establish the existence of pneumoconiosis under § 718.202 is set forth in subparagraph (a)(4): A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion. As stated above, the definition in § 718.201(a) of pneumoconiosis includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis, and so a physician opinion may be expected to discuss either "clinical" pneumoconiosis, or "legal" pneumoconiosis, or both.

A medical opinion is reasoned if the underlying documentation and data are adequate to support the findings of the physician. Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987). A medical opinion that is unreasoned or undocumented may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 B.L.R. 1-149 (1989). Generally, a medical opinion is well documented if it provides the clinical findings, observations, facts and other data the physician relied on to make a diagnosis. Fields, supra. An opinion based on a physical examination, symptoms, and a patient's work and social histories may be found to be adequately documented. Hoffman v. B. & G Construction Co., 8 B.L.R. 1-65 (1985).

The record contains the following medical opinions:

Dr. Glen Baker (DX 12)

Dr. Baker, who is Board-certified in internal medicine and pulmonary medicine and is a B reader, conducted a pulmonary evaluation of the Claimant, as required under § 725.406, in September 2005. This evaluation consisted of a physical examination, the taking of a work and medical history, and the administration of various tests, including a chest X-ray, pulmonary function test, and arterial blood gas test. Dr. Baker made a written report, using Department of Labor forms.

Dr. Baker's report reflected that he considered that the Claimant was a shuttle car operator, had a work history of 25 years in underground mining, and had smoked a pack per day of cigarettes from age 12 or 14 until 1985 or 1986.[11] The Claimant reported to Dr. Baker that for 20 years he had wheezing, coughing, sputum production and dyspnea daily, and that he could walk 25-50 yards on level ground; that he had orthopnea for 8-10 years, and that sleeping with 2 pillows helps; that he has shortness of breath a night, and is helped by inhalers. The Claimant also reported that he had a history of chronic bronchitis and wheezing attacks for 20 years; that he had high blood pressure since 1986; and that he had arthritis in his back and shoulder since 1987 or 1988. On physical examination, Dr. Baker noted decreased breath sounds on auscultation.

In his report, Dr. Baker made the following diagnoses: coal workers' pneumoconiosis; chronic bronchitis; chronic obstructive pulmonary disease [COPD] with severe obstructive pulmonary defect; and hypoxemia. Except for the coal workers' pneumoconiosis, which he attributed solely to coal dust exposure, Dr. Baker attributed these conditions to coal dust exposure and tobacco use.

Dr. Baker also wrote a two-page addendum to his report. In this document, Dr. Baker stated: "[The Claimant] has a chronic lung disease, which was caused by his coal mine employment. This diagnosis is based on clinical pneumoconiosis and legal pneumoconiosis." Dr. Baker went on to explain that the Claimant's X-ray shows signs of clinical pneumoconiosis, and that the Claimant's legal pneumoconiosis is a "symptom complex of chronic bronchitis with cough, sputum production, wheezing and shortness of breath." According to Dr. Baker, the predominant cause of the Claimant's chronic bronchitis, severe obstructive defect, and mild resting arterial hypoxemia was probably his long history of cigarette smoking. Dr. Baker noted that the Claimant also had a long history of coal dust exposure that could cause the same condition; however, Dr. Baker concluded that the predominant cause of the Claimant's condition was his smoking. Nevertheless, Dr. Baker went on to state that coal dust exposure was a significant contributor to the Claimant's COPD, resting arterial hypoxemia, and chronic bronchitis. Dr. Baker also stated: "I still feel his impairment is significantly related to and substantially aggravated by dust exposure in his coal mine employment."

[11] The report states that the Claimant had "proof of 19 ¼ years with W-2s but had worked 25 years underground."

In his report, Dr. Baker characterized the Claimant's level of impairment as "severe," and cited the decreased FEV_1 value and decreased PO2 value. In the addendum to his report, Dr. Baker stated that the Claimant's FEV_1 value is 29% of predicted, which is considered a severe pulmonary impairment, and equates to a 50-100% impairment of the whole person. Dr. Baker concluded that the Claimant would not have the respiratory capacity to do the work of a coal miner. Dr. Baker stated that the predominant etiology for the Claimant's impairment was his cigarette smoking, but that a significant contribution came from the Claimant's dust exposure as well.

Dr. Sanjay Thakur (CX 3)

The Claimant presented a report from Dr. Thakur, his treating physician, dated September 2006. Dr. Thakur is Board-certified in family practice.[12]

In his report, Dr. Thakur stated that he has known the Claimant since July 2002, and has been treating him on a continuous basis since that time. Dr. Thakur noted that the Claimant alleges to have worked in the nations coal mines for 25 years "but was only given 18 years and 4 months [credit]" by the Department of Labor. Citing several X-ray interpretations that were positive for pneumoconiosis, Dr. Thakur concluded that the X-rays were "presumptive" evidence of clinical coal workers pneumoconiosis. Additionally, Dr. Thakur cited Dr. Baker's report, as well as the pulmonary function study conducted by Dr. Dahhan, and stated that the Claimant has symptoms of chronic bronchitis, sputum production, wheezing and shortness of breath, and has a smoking history of 35 to 36 pack years, but has not smoked for approximately 20 years. Dr. Thakur characterized the Claimant's impairment as "severe," stated that it is related to his coal mine employment and cigarette smoking, and related that the Claimant is on continuous oxygen by nasal cannula.

Dr. Thakur cited the Claimant's FEV_1 values, as tested in June 2005 and November 2005, and stated that those values are well below the level that indicates disability. Dr. Thakur concluded, based on these results, that the Claimant has a severe respiratory impairment and would not have the capacity to do the work of a coal miner, even in a dust-free environment.

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[12] The "Guidelines for Black Lung Hearings" appended to ALJ Teitler's Order of August 17, 2006, states that physician credentials must be placed into evidence in order to be considered by the presiding administrative law judge. By letter dated November 6, 2006, the Claimant's representative forwarded CX 1 to CX 4 to this office for inclusion in the record. A notation in the cover letter states: "Curriculum vitae on line per Dr. Thakur." Based on the foregoing, I inferred that the Claimant had introduced Dr. Thakur's professional credentials, as listed on the internet, into evidence. A description of Dr. Thakur's credentials is available at the following website: http://www.baptistoneword.org/doctor/detail.asp?mnuSpec=Family+Practice&Submit=Find&id=8170629. Additionally, Dr. Thakur's Board certification as a family practice physician is included in the American Board of Medical Specialties website, available at http://www.abms.org.

Dr. Abdul Dahhan (EX 1)

At the request of the Employer, Dr. Dahhan, who is Board-certified in internal medicine and pulmonary medicine and is a B reader, conducted an evaluation of the Claimant in November 2005 and submitted a written report.[13] Dr. Dahhan's evaluation consisted of a physical examination, the taking of a medical and work history, and the administration of various medical tests, including a chest X-ray, pulmonary function test, and arterial blood gas test.

Dr. Dahhan's report reflects that the Claimant had a coal mine employment history of 19 years, ending in 1986, and that he worked underground operating a cutting machine and shuttle car. Additionally, Dr. Dahhan considered a smoking history of one pack per day, beginning in 1955 and ending in 1984. The Claimant reported to Dr. Dahhan a history of daily cough with productive clear sputum and intermittent wheeze, as well as dyspnea on exertion. The Claimant's medications, including Proventil via nebulizer; Spireva inhaler; Theophylline oral tablet; and oxygen, were listed. On physical examination, Dr. Dahhan noted increased AP diameter with hyperresonance to percussion and reduced air entry to both lungs with bilateral expiratory wheeze on auscultation.

Dr. Dahhan reviewed the results of the medical tests he administered. Arterial blood gas tests were conducted with the Claimant on oxygen. He noted that spirometry showed a severe obstructive ventilatory defect with partial response to bronchodilator. Lung volume measurements showed air trappings and residual volume of 132%, lung capacity of 73%, and diffusion capacity of 35%. The Claimant's chest X-ray, read by Dr. Dahhan, showed hyperinflated lungs consistent with emphysema, with no pleural or parenchymal abnormalities consistent with pneumoconiosis.

Based on the physical examination, history, and medical tests, Dr. Dahhan concluded that there were insufficient objective findings to justify a diagnosis of coal workers' pneumoconiosis, based on obstructive abnormalities on physical examination; obstructive abnormality on pulmonary function testing; partial response to bronchodilator; and negative X-ray reading for pneumoconiosis. Dr. Dahhan also opined that the Claimant has chronic obstructive lung disease, consisting of chronic bronchitis and emphysema, and that this disability resulted from the Claimant's smoking habit.

Dr. Dahhan concluded that the Claimant does not retain the physiological capacity to continue his previous coal mining work or job of comparable physical demand, and stated that the Claimant's disability resulted from his smoking habit. Dr. Dahhan also stated that he found no evidence of pulmonary impairment or disability caused by, related to, contributed to, or aggravated by inhalation of coal dust or coal workers' pneumoconiosis. Dr. Dahhan indicated that the Claimant's pulmonary disability is "purely obstructive in nature" and "demonstrates response to bronchodilator administration in the laboratory, a finding that is inconsistent with the permanent adverse affects (sic) of coal dust on the respiratory system." Dr. Dahhan also noted that the Claimant was being treated with multiple bronchodilator medications, all agents used to dilate the bronchial pipes in an individual with reversible obstructive defect, which is not seen

[13] Dr. Dahhan's professional qualifications are at EX 2.

secondary to inhalation of coal dust "that normally causes a fixed impairment and does not respond to bronchodilator administration." In addition, stated Dr. Dahhan, the Claimant's obstructive ventilatory defect is severe and disabling in nature, a finding "not usually seen secondary to the inhalation of coal dust, per se," and the Claimant also had no evidence of complicated coal workers' pneumoconiosis or progressive massive fibrosis that could cause a secondary obstructive abnormality.

Discussion

As set forth above, Dr. Baker concluded that the Claimant has both "clinical" and "legal" pneumoconiosis. Dr. Baker's conclusion regarding the Claimant's clinical pneumoconiosis appears to be based primarily on the Claimant's positive X-ray. Dr. Baker points out, however, that medical tests show that the Claimant also has a severe obstructive impairment and a mild resting hypoxemia. Dr. Baker attributes the Claimant's condition to both his cigarette smoking and his coal mine employment history.

In his opinion, Dr. Baker cites the Claimant's "long history of coal dust exposure." The record reflects that the Claimant told Dr. Baker that he had 25 years in underground mining but conceded that he had "credit" for 19 ¼ years. It is not entirely clear, from Dr. Baker's report, whether the "long history" of coal mine employment he considered when assessing the Claimant's condition was 25 years or 19 ¼ years. Based on the Claimant's employment history, as contained in the record, the Claimant actually did work in coal mine employment for approximately 20 years.[14] There is no evidence that the Claimant had 25 years of coal mine dust exposure.

It is appropriate for me to give less weight to a physician opinion which is based on an inaccurate coal mine employment history. Worhach v. Director, OWCP, 17 B.L.R. 1-105 (1993); Chuplis v. Director, OWCP, B.R.B. No. 06-0444 B.L.A. (Dec. 20, 2006). However, even if Dr. Baker's conclusions are based on a coal mine employment history of 25 years, exceeding the Claimant's coal mine dust exposure as documented through his Social Security records, I find that the difference is not significant, for the purpose of Dr. Baker's assessment. Under the circumstances, where the Claimant's employment history consists of many years of underground coal mine employment, both 19 years and 25 years can be considered a "long history."[15] Moreover, as the record establishes, the information Dr. Baker had regarding the termination date of the Claimant's coal mine employment, 1986, was accurate, and so any assessment regarding the etiology of the Claimant's impairment was based on the fact that the Claimant had not worked in the mines for almost 20 years. Therefore, assuming arguendo that

[14] For some years, the Claimant's earnings fell below the average annual wage, as published by the Department's Bureau of Labor Statistics. I presume that this is the reason why the Claimant asserts that he is credited with "19 ¼ years". See generally § 725.101(a)(32) for an explanation of how the average yearly wages of miners are used to approximate the length of coal mine employment.

[15] I also find the distinction between 18 years, 4 months of coal mine employment, and 19 years, is insignificant. I note that the Claimant's Social Security Administration records establish that he worked for coal mine operators during approximately 20 calendar years.

Dr. Baker's assessment was based on a coal mine employment history of 25 years, a fact which is not clear, I do not give any less weight to Dr. Baker's assessment based on that inaccuracy.

Dr. Baker assessed that the Claimant's pulmonary impairment was due to both cigarette smoking and coal mine dust exposure. Although Dr. Baker identified and apportioned the two factors (stating that smoking was the predominant contributor to the Claimant's condition), and cited the medical tests that show the Claimant's obstructive impairment, he did not specifically state how he arrived at his determination. Dr. Baker did state, however, that the Claimant's impairment is "significantly related to and substantially aggravated by dust exposure" in the Claimant's coal mine employment, which is the test the regulation sets forth in § 718.201(a)(2).

As the record reflects, Dr. Baker is a Board-certified pulmonary specialist. The regulation requires that a physician opinion be based on objective medical test results, as well as objective medical findings. Dr. Baker's report reflects the Claimant's significant pulmonary impairment, as measured by pulmonary function tests. Because Dr. Baker does not explain why he concluded that the Claimant's pulmonary impairment was "significantly related to and substantially aggravated by dust exposure," rather than merely making a conclusion in that regard, I give his conclusion less weight. However, I give his conclusion more weight than I give to the opinion of Dr. Dahhan, who has equivalent professional credentials, because Dr. Baker considered the fact that the Claimant has both a significant coal mine employment history and many years of smoking. As will be noted below, Dr. Dahhan's assessment dismisses any role that the Claimant's coal mine employment history played in his pulmonary condition.

Dr. Thakur's statement, in which he discussed presumptive evidence of coal workers' pneumoconiosis and stated that the Claimant's respiratory impairment is related to his coal mine employment, could be inferred to be an opinion that the Claimant has both "clinical" and "legal" pneumoconiosis. I give Dr. Thakur's opinion some weight, as he is a Board-certified family practice physician and has been the Claimant's treating physician for several years. Notably, Dr. Thakur's opinion also reflects that he has reviewed several chest X-ray interpretations, as well as medical tests administered by Dr. Baker and Dr. Dahhan. Dr. Thakur also has reviewed Dr. Baker's opinion. Consequently, Dr. Thakur's opinion is informed by a significant quantum of objective medical test results, as well as his own personal observation of the Claimant.

Under the definition of legal pneumoconiosis set forth in § 718.201(a)(2), there must be a "significant" relationship between coal mine dust exposure and a pulmonary impairment. Dr. Thakur's conclusion states that there is a relationship between coal dust exposure and the Claimant's pulmonary impairment, but Dr. Thakur does not indicate that the relationship was "significant." Consequently, I must conclude that Dr. Thakur's opinion is that the Claimant's pulmonary condition does not meet the regulatory standard for "legal" pneumoconiosis, because he does not assert that the relationship between the Claimant's coal dust exposure and his pulmonary impairment is a significant one. I find, therefore, that Dr. Thakur's opinion is that the Claimant has clinical pneumoconiosis and that his pulmonary impairment, though related to his coal mine employment, does not constitute legal pneumoconiosis. Based in part upon Dr. Thakur's status as the Claimant's physician, but also upon the observation that Dr. Thakur considered data from a number of sources, I find his opinions to be well-reasoned, and I give them significant weight.

Dr. Dahhan's report does not reflect that he reviewed any medical records pertaining to the Claimant, so I presume that Dr. Dahhan's opinion is based solely on his own observations and the medical tests he conducted. As Dr. Dahhan's opinion states, these tests indicate, quite clearly, that the Claimant has a severe respiratory impairment. Dr. Dahhan's opinion, that there is insufficient evidence to conclude that the Claimant has coal workers' pneumoconiosis, appears to be based primarily on Dr. Dahhan's own X-ray interpretation, which Dr. Dahhan read as negative. Although Dr. Dahhan has had the opportunity to review Dr. Alexander's interpretation of the same X-ray, which was positive for the disease, Dr. Dahhan did not change his opinion regarding that X-ray interpretation. Dr. Dahhan also did not change his opinion that there was a lack of evidence of pneumoconiosis.[16]

As set forth above, Dr. Dahhan's opinion regarding clinical pneumoconiosis is inconsistent with my finding. Even though the Claimant presented pulmonary abnormalities on physical examination and as the result of medical testing, Dr. Dahhan appears not to have considered whether the Claimant could have pneumoconiosis, notwithstanding a negative X-ray. The regulation recognizes that such a scenario is indeed possible. See § 718.202(a)(4). Because Dr. Dahhan does not consider this possibility, I find his opinion not well-reasoned, and I give his opinion regarding clinical pneumoconiosis little weight.

Dr. Dahhan also concluded that the Claimant's pulmonary impairment was unrelated to his coal mine dust exposure. Therefore, I infer that Dr. Dahhan's opinion is that the Claimant does not have legal pneumoconiosis, as defined in § 718.201(a)(2). The principal basis for Dr. Dahhan's conclusion is that the Claimant's pulmonary impairment is purely obstructive, and because it "demonstrates response to bronchodilator administration" the Claimant's condition is "inconsistent with the permanent adverse affects (sic) of coal dust on the respiratory system." Dr. Dahhan also commented that the fact that the Claimant is being treated with respiratory dilation agents indicated his condition is not secondary to inhalation of coal dust, because that "normally causes a fixed impairment and does not respond to bronchodilator administration." Lastly, Dr. Dahhan also commented that the Claimant has no evidence of complicated pneumoconiosis or progressive massive fibrosis that could cause a secondary obstructive impairment.

Dr. Dahhan's remarks regarding the Claimant's obstructive respiratory impairment apparently indicate that Dr. Dahhan has not considered whether the Claimant's impairment could be due to multiple factors. For example, Dr. Dahhan stated that the Claimant's impairment is amenable to bronchodilation and, therefore, cannot be caused by coal mine dust. This conclusion fails to take into consideration that the bronchodilators were not very effective: even after they were administered, the Claimant's impairment met regulatory standards for disability. Dr. Dahhan's statement that the Claimant is currently being prescribed bronchodilating medications, and therefore his obstructive impairment cannot be related to coal mine dust, failed to discuss why the Claimant's impairment is "severe," notwithstanding constant treatment.

[16] Indeed, Dr. Dahhan's initial report stated that there was "insufficient objective evidence" of coal workers' pneumoconiosis (EX 1); his rebuttal report stated that there was "no evidence" of pneumoconiosis (EX 8).

Moreover, in his report, Dr. Dahhan also appeared to suggest that an obstructive impairment cannot be related to coal dust, unless the individual has complicated pneumoconiosis or progressive massive fibrosis. This conclusion is inconsistent with the regulatory definition of legal pneumoconiosis, which specifically includes obstructive impairments. § 718.201(a)(2).

Under these facts, because Dr. Dahhan's report does not discuss the combined effects of coal mine dust and tobacco, but rather dismisses any effect of coal mine dust exposure, I find Dr. Dahhan's report not to be well-reasoned, and I give it little weight.

Weighing the physicians' opinions, based on the foregoing discussion, I find that the Claimant has established, by a preponderance of evidence, that he has clinical pneumoconiosis. Although it is a close question, I also find that the Claimant has established, by a preponderance of evidence, that he has "legal pneumoconiosis" as well. A more complete discussion of the etiology of the Claimant's pulmonary impairment, which constitutes legal pneumoconiosis, appears below.

The finding that the Claimant has pneumoconiosis, as defined in the regulation, constitutes a change in condition of entitlement since the final denial of the Claimant's previous claim, in 1996.

b. Whether the Pneumoconiosis "Arose out of" Coal Mine Employment

Under the governing regulation, a miner who was employed for at least ten years in coal mine employment is entitled to a rebuttable presumption that pneumoconiosis arose out of coal mine employment. § 718.203(b). In this case, the Employer has stipulated that the Claimant has 18 years, four months of coal mine employment. Therefore, he is entitled to the rebuttable presumption, at least with regard to clinical coal workers' pneumoconiosis that has been established.

The regulation recognizes that a chronic pulmonary condition "arising out of coal mine employment" is considered "legal pneumoconiosis." § 718.201(a)(2). The regulation defines the term "arising out of coal mine employment" as including any chronic pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." § 718.201(b). The burden to establish the causal link between coal mine employment and the pulmonary impairment remains with the Claimant. See Anderson v. Director, OWCP, 455 F.3d 1102 (10th Cir. 2006).

This standard does not require that dust exposure be the sole cause, or even the greatest contributing cause, of the pulmonary impairment. What is required, under the regulation, is a demonstrably significant relationship between dust exposure and the Claimant's respiratory condition. Consequently, if the Claimant's pulmonary condition could have multiple causes, and he has the requisite history of dust exposure in coal mine employment, unless the Employer comes forward with evidence that dust exposure played no role, or only a minimal role, in the claimant's pulmonary condition, the presumption is satisfied. See Peabody Coal Co. v. Smith, 127 F.3d 504,507 (6th Cir. 1997).

The Employer has introduced evidence that the Claimant's chronic obstructive lung disease, which consists of chronic bronchitis and/or emphysema, is not related to the Claimant's coal mine employment but is caused by his smoking. I infer that this evidence is intended to negate the conclusion that the Claimant's chronic obstructive lung disease is "legal pneumoconiosis," as defined in the regulation at § 718.201(a)(2). However, as discussed above, I give little weight to Dr. Dahhan's conclusion that the Claimant's impairment is caused solely by his smoking. Because I have found that the Claimant has "legal pneumoconiosis," I necessarily find that his pulmonary impairment arose from his coal mine employment.

I find, therefore, that the Claimant has established, by a preponderance of evidence, that his pneumoconiosis arose from his coal mine employment. This constitutes a change in condition of entitlement since the final denial of his previous claim, in 1996.

c. Whether the Claimant is Totally Disabled

The Claimant bears the burden to establish that he is totally disabled due to a respiratory or pulmonary condition. Section 718.204(b)(1) states that a miner shall be considered totally disabled "if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner: (i) from performing his or her usual coal mine work; or (ii) from engaging in gainful employment . . . requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time." Nonpulmonary and nonrespiratory conditions, which cause an "independent disability unrelated to the miner's pulmonary or respiratory disability" shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. § 718.204(a). See also Beatty v. Danri Corp., 16 B.L.R. 1-11 (1991).

The regulation provides that, in the absence of contrary probative evidence, the following may be used to establish a miner's total disability: pulmonary function tests with values below a specified threshold; arterial blood gas tests with results below a specified threshold; a finding of pneumoconiosis with evidence of cor pulmonale with right-sided congestive heart failure. § 718.204(b)(2)(i)(ii) and (iii). Where the above do not demonstrate total disability, or appropriate medical tests are contraindicated, total disability may nevertheless be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in his usual coal mine employment. § 718.204(b)(2)(iv).

1) Pulmonary Function Tests

A Claimant may establish total disability based upon pulmonary function tests. In order to demonstrate total respiratory disability on the basis of the pulmonary function tests, the studies must, after accounting for gender, age, and height, produce a qualifying value for the forced expiratory volume [FEV_1] test and at least one of the following: a qualifying value for the forced vital capacity [FVC] test; a qualifying value for the maximum voluntary volume [MVV] test; or a value of the FEV_1 divided by the FVC that is less than or equal to 55%. § 718.204(b)(2)(i). "Qualifying values" for the FEV_1, FVC, and the MVV tests are results measured at less than or equal to the values listed in the appropriate tables of Appendix B to Part 718.

The record contains the following pulmonary function test results. When two values are listed, the second value reflects measurements obtained after a bronchodilator was administered.

Date of Test	Physician	Height	FEV_1	FVC	MVV	FEV_1/FVC ratio	Valid ?
06/01/2005	Narayanan	66 in.	0.68	1.57	Not recorded	43%	In dispute[17]
09/06/2005	Baker	65 ½ in.	0.78	2.59	Not recorded	30%	Yes[18]
11/10/2005	Dahhan	164 cm	0.59/0.70	1.58/1.75	12.0/16.0	37%/40%	unknown[19]
02/23/2006	Roatsey	65 in.	0.50	1.64	Not recorded	30%	Yes[20]

The Claimant was born in January 1937, so he was 68 years old when most of the tests were performed, and 69 years old at the time of the most recent test, in February 2006. His height was variously listed at 65 inches, 65 ½ inches, 66 inches, and 164 centimeters, which equates to 64.5 inches. I find that he is at least 65.25 inches tall, which is the average of the recorded heights. See Protopappas v. Director, OWCP, 6 B.L.R. 1-221 (1983).

For a 68 year old male, who is at least 65 inches tall but less than 65.4 inches tall, the qualifying FEV_1 value is 1.52, the qualifying FVC value is 1.98, and the qualifying MVV value is 61. At age 69, the qualifying FEV_1 value is 1.51, the qualifying FVC value is 1.96, and the qualifying MVV value is 60.

As set forth above, with FEV_1 values ranging between 0.50 and 0.78, the Claimant attained a qualifying FEV_1 score on all of the tests of record. Except for the test Dr. Baker administered, the Claimant also attained a qualifying FVC score, with values ranging between 1.57 and 1.75. On the one test in which the MVV score was recorded, the test Dr. Dahhan administered, the Claimant attained a qualifying score. For every test, the Claimant's FEV_1/FVC ratios, which ranged between 30% and 43%, were below the qualifying value of 55%. Based on the foregoing, then, the Claimant attained a qualifying score on all of the pulmonary function tests that are included in this record.

I do note, however, that the validity of the test Dr. Narayanan administered is in dispute. Dr. Narayanan is Board-certified in internal medicine, but is not a pulmonary specialist. Dr. Broudy, who is a Board-certified pulmonary physician, has opined that excessive variation in the

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[17] Dr. Bruce Broudy, who is Board-certified in pulmonary medicine, opined that the test was invalid because of "excessive variability of the FEV_1 and FVC;" in addition, according to Dr. Broudy, inspection of the tracings indicated that the Claimant's effort was "variable and suboptimal."

[18] On review, this test result was validated by Dr. John Michos, a Board-certified pulmonary specialist.

[19] Flow-volume loops for all trials are not included in the record. See Appx B to part 718.

[20] Dr. Thomas Roatsey, who is Board-certified in family medicine and occupational medicine, validated this test result (CX 2).

scores attained in the trials make the test invalid; he has also opined that the flow-volume loops show a "variable and suboptimal" effort from the Claimant (EX 5).[21] The record of the test indicates that the Claimant's effort and cooperation were "good" (DX 13). This is inconsistent with Dr. Broudy's assessment.

Dr. Broudy appears to be correct, however, that there is excessive variability in the FEV_1 values. However, the regulation states: "As individuals with obstructive disease or rapid decline in lung function will be less likely to achieve this degree of reproducibility, tests not meeting this criterion may still be submitted for consideration in support of a claim for black lung benefits." Appx. B to part 718, para. (2)(ii)(G). Moreover, the results attained in the test that Dr. Narayanan administered are very similar to the results of other tests that have been validated. I find, therefore, that the test Dr. Narayanan administered has some validity, and should be considered. However, because of the questions regarding that test's validity, I give that test slightly less weight than I give to the other pulmonary function tests results.

In this case, the record reflects that the Claimant received qualifying results on multiple pulmonary function tests that have been validated. Additionally, there is no record of a nonqualifying pulmonary function test for this Claimant, in conjunction with this claim. Therefore, I find that the Claimant is able to establish total disability under this provision.

2) Arterial Blood Gas Tests

A Claimant may also establish total disability based upon arterial blood gas tests. In order to establish total disability, the test must produce a qualifying value, as set out in Appendix C to Part 718. § 718.204(b)(2)(ii). Appendix C lists values for percentage of carbon dioxide [PCO_2] and percentage of oxygen [PO_2], based upon several gradations of altitudes above sea level. At a specified gradation (e.g., 2999 feet above sea level or below), and PCO_2 level, a qualifying value must be less than or equivalent to the PO_2 listed in the table.

The record contains the following arterial blood gas test results:

Date of Test	Physician	PCO_2	PO_2	PCO_2 (post-exercise)	PO_2 (post-exercise)	Altitude
09/06/2005	Baker	41	70	Not done[22]	Not done	< 2999 ft.

[21] Dr. Broudy's professional credentials are at EX 6.

[22] Under the regulation, an exercise blood gas test shall be offered unless medically contraindicated. § 718.105(b). The record reflects that the Claimant did not take an exercise blood gas test because of degenerative joint disease. Under the circumstances described in the record, where the Claimant had a medical condition of a non-pulmonary nature that made exercise difficult, I find that an exercise blood gas test was contraindicated.

11/10/2005	Dahhan [23]	42.5	94.7	44.8	77.2	No record[24]

* Post-exercise trials not performed.

For a PCO_2 value between 40 and 49, at an altitude of 2999 feet or less, the qualifying PO_2 value must be equal to or less than 60; at an altitude of 3000-5999 feet, the qualifying PO_2 value must be equal to or less than 55.

The Claimant did not attain a qualifying value on either of the arterial blood gas tests set forth above. Therefore, I find that the Claimant is unable to establish total disability under this provision.

3) Cor Pulmonale

A miner may demonstrate total disability with, in addition to pneumoconiosis, medical evidence of cor pulmonale with right-sided congestive heart failure. § 718.204(b)(2)(iii). There is no evidence of cor pulmonale with right-sided congestive heart failure. Accordingly, I find that the Claimant has not established total disability under this provision.

4) Physician Opinion

The final method of determining whether the Claimant is totally disabled is through the reasoned medical judgment of a physician that the Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable gainful employment. Such an opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. § 718.204(b)(2)(iv). A reasoned opinion is one that contains underlying documentation adequate to support the physician's conclusions. Fields v. Island Creek Coal Co., 10 BLR 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he bases his diagnosis. Id. An unreasoned or undocumented opinion may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989). A physician's opinion must demonstrate an adequate understanding of the exertional requirements of the Claimant's coal mine employment. Brigance v. Peabody Coal Co., 23 B.L.R. 1-170 (2006)(en banc).

As summarized above, all of the physicians who rendered opinions regarding the Claimant's level of impairment stated that the Claimant was totally disabled, and was unable to work as a miner. Dr. Baker stated that the Claimant's FEV_1 value is 29% of predicted, which is considered a severe pulmonary impairment. Dr. Thakur and Dr. Dahhan also cited the Claimant's pulmonary function test results as evidence that the Claimant is severely impaired. In addition, the record reflects that both Dr. Baker and Dr. Dahhan were aware that the Claimant

[23] Dr. Dahhan's report states that this test was conducted while the Claimant was on oxygen.

[24] Per 29 C.F.R. § 18.201, judicial notice may be taken of adjudicative facts. The highest point in Kentucky, where this test was performed, has an altitude of 4145 feet. See: http://www.geology.com/states/Kentucky.shtml.

was a shuttle car operator or operated a cutting machine, and that his work was underground. Their opinions reflect a general knowledge of the exertional nature of the Claimant's coal mine employment.

Based on the fact that the physicians who rendered opinions unanimously concluded that the Claimant is permanently disabled and cited his pulmonary function test results, and considering that at least two of the physicians understood the general nature of the Claimant's job in coal mine employment underground, I find that the Claimant has established, based on physician opinion, that he is totally disabled, from a pulmonary perspective. Taking all of the evidence relating to the level of the Claimant's pulmonary impairment together, and specifically considering the pulmonary function test evidence cited above, I find that the Claimant has established, by a preponderance of evidence, that he is totally disabled by a pulmonary impairment. This represents a change in condition of entitlement since the final denial of the Claimant's previous claim, in 1996.

d. Whether the Claimant's Disability is Due to Pneumoconiosis

Lastly, the Claimant must establish that he is totally disabled due to pneumoconiosis. This element is fulfilled if pneumoconiosis, as defined in § 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. § 718.204(c); Consolidation Coal Co. v. Williams, 453 F.3d 609 (4th Cir. 2006); Consolidation Coal Co. v. Swiger, 98 Fed. Appx. 227 (4th Cir. 2004)(unpublished); Grundy Mining Co. v. Flynn, 353 F.3d 467 (6th Cir. 2004); Lollar v. Alabama By-Products Corp., 893 F.2d 1258 (11th Cir. 1990).

The regulations provide that pneumoconiosis is a "substantially contributing cause" of the miner's disability if it (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. In general, the fact that an individual suffers or suffered from a totally disabling respiratory or pulmonary impairment is not, in itself, sufficient to establish that the impairment is or was due to pneumoconiosis. § 718.204(c)(2). A Claimant can establish this element through a physician's documented and reasoned medical report. §718.204(c).

As set forth above, Dr. Baker and Dr. Thakur opined that the Claimant's disabling impairment is based on both smoking and coal mine dust exposure. On the other hand, Dr. Dahhan's opinion was that the Claimant's disabling impairment is based entirely on his smoking habit. A centerpiece of Dr. Dahhan's opinion is his assessment that the Claimant's obstructive impairment is partially reversible by bronchodilators. Dr. Dahhan asserted that a coal dust related impairment is not reversible, so any reversible impairment must be due to another cause. Therefore, the fact that the Claimant demonstrates some reversibility with bronchodilators must mean that his impairment is not coal dust related.

However, Dr. Dahhan failed to either note or explain that the Claimant's FEV_1 level rose only from 0.50 (20% of normal) to 0.70 (24% of normal) with bronchodilation and that the Claimant's pulmonary function study results, after bronchodilation, still are qualifying for

disability. Presuming that Dr. Dahhan's thesis that coal dust related impairments are not reversible is correct, this pulmonary function test establishes that, even after bronchodilation, the Claimant has a disabling, and nonreversible, pulmonary impairment. These results show, in addition, that the Claimant's pulmonary impairment is most likely due to a combination of factors.

Dr. Baker, a Board-certified pulmonary specialist, and Dr. Thakur, the Claimant's Board-certified family medicine physician, have stated that the Claimant's disability is due to both smoking and his coal mine dust exposure. It is not necessary for me to be convinced that pneumoconiosis, as defined in the regulation, is the primary cause of the Claimant's disability, but I must be satisfied that the Claimant's disability has been caused at least in part by pneumoconiosis, as defined in the regulation, and that the pneumoconiosis was a contributing factor of more than minimal impact. Adams v. Director, OWCP, 886 F.2d 818 (6th Cir. 1989); see Peabody Coal Co. v. Smith, 127 F.3d 504 (6th Cir. 1997); Cornett v. Benham Coal Co., 227 F.3d 569 (6th Cir. 2000). Under the regulation, this conclusion is sufficient justification for the award of benefits. See Adams v. Director, OWCP, 886 F.2d 818 (6th Cir. 1989); Cornett v. Benham Coal, Inc., 227 F.3d 569 (6th Cir. 2000).

I find that the Claimant has met this standard. In weighing the opinions of the three physicians, as well as assessing the objective evidence, I give the most weight to Dr. Baker, who is a Board-certified pulmonary specialist. I give very little weight to Dr. Dahhan's assessment, because his conclusion, that the Claimant's impairment is not related to coal dust because it is reversible, is contradicted by the results of the pulmonary function tests he himself administered, (which show a profound irreversible impairment). I also give some weight to Dr. Thakur's assessment. Based on Dr. Thakur's conclusion that the Claimant's disability is "related" to his coal mine employment, I infer that Dr. Thakur has determined that the majority of the Claimant's disability is due to his smoking. This is consistent with Dr. Baker's assessment.

Based on the foregoing, I find that the Claimant has established that pneumoconiosis, as defined in the regulation, is a "substantially contributing cause" of disabling his respiratory impairment. Therefore, I find that the Claimant has established, by a preponderance of evidence, that his totally disabling respiratory condition is due to pneumoconiosis. This constitutes a change in condition of entitlement since the final denial of the Claimant's previous claim, in 1996.

G. Application of § 725.309 to Claimant's Current Claim

As noted above, the Claimant's current claim is a subsequent claim, which must be denied unless the Claimant can establish at least one condition of entitlement that has previously been decided against him. § 725.309(d). I find that the Claimant has established, by a preponderance of evidence, all of the elements of entitlement. In addition, I find that, comparing the evidence submitted in conjunction with this claim with the evidence submitted in conjunction with the prior claim, the evidence is sufficiently more favorable to warrant a change in outcome. See Grundy Mining Co. v. Flynn, 353 F.3d 467 (6th Cir. 2004).

IV. CONCLUSION AND EFFECTIVE DATE OF AWARD

Based upon applicable law and my review of all of the evidence, I find that the Claimant has established his entitlement to benefits under the Act.

Benefits for a miner who is totally disabled due to pneumoconiosis commence with the month of onset of total disability. Where the evidence does not establish the month of onset, benefits begin with the month that the claim was filed. § 725.503(b). Medical evidence of total disability does not establish the date of entitlement: rather, it shows that a claimant became disabled at some earlier date. Owens v. Jewell Smokeless Coal Corp., 14 B.L.R. 1-47, 1-50 (1990).

Based upon the evidence of record, I find that the effective date upon which the Claimant became totally disabled cannot be established. Therefore, I find that the Claimant's entitlement to benefits shall be computed from June 2005, the month in which the Claimant filed his current claim.

V. REPRESENTATIVE'S FEE

The record reflects that the Claimant is represented by a non-attorney as a personal representative. A non-attorney may be awarded a fee for representation; however, no lien may be placed upon a Claimant's award of benefits to ensure the payment of fees to a non-attorney. See § 725.366(a), § 725.365. The Act also limits the payment of fees by the responsible operator to cases in which the Claimant is represented by an attorney. § 725.367.

No award of fees for services provided to the Claimant is made herein because no fee application has been received. Within 30 days, Claimant's representative shall submit a fee application, in conformance with §§ 725.365 and 725.366 of the regulations. The application must be served on all parties, and a service sheet documenting such service must accompany the application. Parties have ten (10) days following the receipt of any application within which to file any objection. The Act prohibits the charging of a fee in the absence of an approved application.

VI. ORDER

The Claimant's Claim for benefits under the Act is AWARDED.

A

Adele H. Odegard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).